

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of NICHOLAS WYATT BURNS,
Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

ANDREA MARIE SIKORSKI-BURNS,

Respondent-Appellant.

UNPUBLISHED

February 8, 2007

No. 272773

Grand Traverse Circuit Court

Family Division

LC No. 02-000405-NA

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court's order terminating her parental rights to the minor child under MCL 712A.19b(3)(c)(i), (g), (j), and (k)(i).¹ We affirm.

In order to terminate parental rights, the trial court must find that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met by clear and convincing evidence. *In re Jackson*, 199 Mich App 22, 25; 501 NW2d 182 (1993). "Once a ground for termination is established, the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests." *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000); see also MCL 712A.19b(5). We review the trial court's determination for clear error. *Trejo, supra* at 356-357. Further, we must give due regard to the trial court's special opportunity to observe the witnesses. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

Applying these principles, we find no clear error in the trial court's determination that the evidence supported termination under multiple statutory grounds. *Trejo, supra* at 356-357. Testimony clearly and convincingly established that respondent had a longstanding and serious substance abuse problem for which past treatment had been largely unsuccessful. Because of her

¹ Contrary to respondent's argument on appeal, the trial court did not terminate her parental rights under subsection (a)(ii).

substance abuse and resultant incarcerations, she was absent for substantial periods of time during the child's life. Her absences, according to the child's therapist, caused "significant injury" to the child and contributed to his emotional and behavioral problems, attachment issues, instability and insecurity. At the time of the child's adjudication, respondent was unavailable or unable to care for him because of her imprisonment, where she remained for the duration of the proceedings. We recognize that respondent was expected to be released shortly, underwent intensive substance abuse treatment while in prison, expressed a strong desire to reunify with the child, and had a plan in place to do so. However, while her progress was commendable, under her plan, she would not be ready within a reasonable period of time to provide the child with the ongoing permanence and stability that was paramount to his emotional wellbeing. It also remained questionable, given that her past rehabilitative efforts were unsuccessful, whether she had truly overcome her substance abuse issue that led to her absences from the child and caused instability in his life. On this record, we cannot conclude that the trial court clearly erred in terminating respondent's parental rights under MCL 712A.19b(3)(c)(i), (g), and (j).² *Trejo*, *supra* at 356-357. Respondent clearly remained unable to care for the child and would not be ready to do so within a reasonable time considering his young age, and there was a reasonable likelihood, given her past conduct and the detrimental effect it had on the child, that he would likely be subjected to further harm if returned to respondent's home. We also find no clear error in the trial court's determination concerning the child's best interests. *Id.*

Respondent next argues that her appointed trial counsel was ineffective by failing to properly plan a trial strategy to adequately defend the termination petition. We review this issue by applying the test for ineffective assistance of counsel in criminal matters. *In re Rogers*, 160 Mich App 500, 502; 409 NW2d 486 (1987). For this Court to reverse on the basis of ineffective assistance of counsel, respondent "must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced [her] as to deprive [her] of a fair trial." *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); and see *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Respondent must overcome the presumption that the challenged action might be considered sound trial strategy and must show that, but for counsel's error, the result of the proceeding would have been different. *Id.* Respondent carries the burden to produce factual support for her claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Further, because a *Ginther*³ hearing was not conducted, our review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 Mich NW2d 611 (2003); *Sabin*, *supra* at 658-659.

² We fail to find clear and convincing evidence, however, that respondent abused her child by abandonment to support grounds for termination under subsection (k)(i). Although it is undisputed that respondent was absent from the child's life for substantial periods of time during her incarcerations, she attempted to maintain contact with the child, attempted to ensure that he was cared for, and sought custody of the child after her releases. Regardless, any error was harmless because only one statutory ground is required to affirm the termination order. *In re Powers*, 244 Mich App 111, 118; 624 NW2d 472 (2000).

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Respondent's first allegation is that her counsel was ineffective because he did not communicate with her before the termination trial commenced, and consequently, was unaware of her point of view, her history, strengths, or the particulars of the treatment program that she completed while in prison. We disagree. Our review of the record reveals that her counsel effectively attempted to persuade the court not to terminate respondent's parental rights by eliciting testimony favorable to her case through cross-examination of petitioner's witnesses. Notably, her counsel elicited testimony from respondent, which the court found "very compelling," regarding her progress toward addressing her substance abuse problem, including her participation in an intensive inpatient program and how she had grown emotionally while in prison, her plan to gain employment upon her release, her strong desire to parent the child, and her plan to work toward reunification with him after her release. Her counsel also offered documents, which the court admitted, showing her completion of substance abuse treatment while in prison. Where the record, as here, indicated that her counsel was aware of and effectively addressed the issues pertinent to the case, there is simply no factual support for respondent's allegation that her counsel was deficient in failing to communicate with her. *Hoag, supra* at 6.

Respondent's next allegation of ineffectiveness is that her counsel failed to call any witnesses to testify on her behalf. Respondent, however, does not identify specifically how those witnesses would have assisted her, and thus, failed to establish that counsel's failure to call witnesses prejudiced her case. *Sabin, supra* at 658-659. Moreover, given the strength of the evidence supporting termination, even had he called a witness to testify, it would likely not have changed the outcome of the proceedings. *Id.*

Finally, respondent alleges that her counsel was ineffective because he failed to request an adjournment of the trial to allow him additional time to prepare. However, there is simply nothing in the record to suggest that her counsel was unprepared. To the contrary, her counsel effectively cross-examined witnesses, elicited favorable testimony, and offered exhibits favorable to respondent's case. In fact, the record revealed that respondent's counsel had previously moved for an adjournment to allow him additional time to prepare for the case. As with respondent's other allegations of ineffectiveness, the record lacks factual support for her allegation that her counsel was deficient in failing to move to adjourn the trial. *Hoag, supra* at 6.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Pat M. Donofrio